

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 26, 2008

STATE OF TENNESSEE v. ANTHONY DUSTIN DESANTO

Direct Appeal from the Circuit Court for Sevier County
Nos. 10540; 10616 Richard R. Vance, Judge

No. E2007-01009-CCA-R3-CD - Filed March 28, 2008

The Defendant, Anthony Dustin DeSanto, pled guilty to burglary and theft over \$10,000, and the trial court sentenced him to a period of confinement and then probation. After seven months in jail, the Defendant was placed on probation. A probation violation warrant was then issued less than two years later, and, after a hearing, the trial court revoked the Defendant's probation. On appeal, the Defendant alleges the trial court erred in this decision. After a thorough review of the record and applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. McLIN, JJ., joined.

Amber D. Haas, Sevierville, Tennessee, for the Appellant, Anthony Dustin DeSanto.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A. Ball, Assistant Attorney General; James Dunn, District Attorney General; Jeremy Ball, Assistant District Attorney General, for the Appellee, the State of Tennessee.

OPINION

I. Facts

The following was presented at the hearing on the probation revocation: Initially, the Defendant conceded that he violated his probation by testing positive for cocaine and marijuana on April 7, 2006; marijuana and opiates on June 29, 2006; cocaine, marijuana, and opiates on July 13, 2006; and cocaine, marijuana, and opiates on February 8, 2007. The Defendant also admitted that he failed to pay fees of \$215 and restitution of \$15,989.50 and that he failed to follow the mandates of the Administrative Case Review Committee. The Defendant explained that he attended New

Hope Recovery for four months until Thanksgiving Day.¹ He was granted a three day “pass” to return home, where he “had a slip-up and drank some.” He told the counselors at New Hope Recovery, and they directed him to return in two weeks to begin the program again.

When he was scheduled to return to New Hope Recovery, they informed him there was not enough space, and he would need to wait. The Defendant stated that he passed his drug screens for a period of time, and, because of this, his probation officer, Burnett, expressed doubts about whether the Defendant needed to return to New Hope Recovery. The Defendant knew he had a drug problem, so he attempted to check himself into outpatient treatment at Bendel. Bendel placed him on the waiting list, and, during this time, he relapsed. The Defendant admitted to the court that he had a drug problem and asked for help.

Mr. Burnett explained to the trial court that, in addition to the Defendant’s failed drug screens, he attempted to use a “Wizzinator”² to give a false negative. Mr. Burnett also stated that the Defendant was actually suspended from New Hope because he brought alcohol into the facility.

The trial court determined that the Defendant violated his probation and ordered the Defendant to serve the balance of his sentence in the Department of Correction. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant asserts the trial court erred in finding him in violation of his probation. When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); see T.C.A. §§ 40-35-308, 310, 311 (2006). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . .” *Id.*; accord *Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension . . .” T.C.A. § 40-35-310.

¹Although the Defendant did not state the year, context suggests 2006.

²Burnett described the “Wizzinator” as an “object that looks like a penis, and you put somebody else’s urine in it, and when – because we’re observing the, so it looks like that is the real thing when they pee in the bottle, but he was caught as he was fumbling with it.”

Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, our supreme court has stated:

We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. *State v. Williamson*, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

Our review of the record supports the trial court's determination that the Defendant violated conditions of his probation. Among the rules required of the Defendant were that he follow the directions of the probation officer, pay fees, pay restitution, comply with the mandates of the Administrative Case Review Committee, and abstain from the use of drugs. The Defendant admitted that he repeatedly tested positive for a number of illegal drugs, failed to pay fees, failed to pay restitution, and failed to comply with the requirements of the Administrative Case Review Committee. Burnett also testified that the Defendant used a "Wizzinator" to avoid testing positive for drugs. We find substantial evidence in the record to support the trial court's decision to revoke the Defendant's probation and order service of sentence. The Defendant is not entitled to relief on this issue.

III. Conclusion

After due consideration of the issues, we conclude that there is substantial evidence to support the trial court's determination. As such, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE